IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 147 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAVJIVAN OIL MILLS

Versus

COMMISSIONER OF INCOME TAX

Appearance:

1. INCOME TAX REFERENCE No. 147 of 1986

MR MK PATEL FOR MR KC PATEL for Applicant.

MR BB NAYAK FOR MR RP BHATT for Respondent.

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 19/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench, "B" has referred the following two questions for the opinion of this Court.

> "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in confirming levy of penalty of Rs.10,400/- imposed u/s.271(1)(c) of the Income Tax Act,1961.
>
> (2) Whether, the Tribunal was justified in invoking Explanation to section 271(1)(c) and in holding that the additions in question were not covered by proviso to section 145 of the Act?"

2. The assessee is a registered firm. The assessment year is 1973-74 and the relevant accounting period is S.Y.2028. On 28/8/1973 the return of income showing total income of Rs.27,213/- was filed by the assessee firm.

3. It appears that on 10/12/1971 the Sales Tax Department conducted the search and seizure proceedings at the business premises of the assessee firm and seized various articles. According to the Income Tax Officer the most important item in the seized material was item no.9 which consisted of five books. The said five books were serially numbered as 9/1, 9/2, 9/3, 9/4 and 9/5. It is further recorded in the assessment order that out of these five books on examination it was observed that the first three diaries bearing Nos. 9/1, 9/2 and 9/3 pertained to S.Y.2027 while the remaining two diaries pertained to S.Y.2028 i.e. the year under consideration. In light of these observations recorded by the Income Tax Officer in the assessment order he has stated thus in para 2 :

> "2. In the immediate preceeding year the case of the assessee has been narrated at length giving full particulars of the various activities of the assessee. The facts for the year are similar to that of earlier year. However, even at the cost of repetition some of the facts are reproduced here."

4. Accordingly, the assessment was framed on total income of Rs.60,214/-, wherein the Income Tax Officer added Rs.20,000/- towards concealed capital and Rs.13,000/- as being probable profit at 5% on estimated

sales of Rs.2,60,000/-.

5. The assessee succeeded partly in appeal. The Appellate Assistant Commissioner deleted addition of Rs.20,000/- as according to him the said addition was already taken care of by the addition made in the preceding year. In so far as the addition as regards estimated profit was concerned the rate of 4% of net profit was adopted and the addition was reduced to Rs.10,400/- from Rs.13,000/-. Being aggrieved by the aforesaid appellate order both assessee and the revenue went in appeal before the Tribunal and the Tribunal confirmed the order of the Appellate Assistant Commissioner.

6. The Income Tax Officer vide his order dated 6/8/1980 levied the penalty of Rs.10,400/-, in view of the fact that AAC and ITAT had confirmed the addition to the aforesaid extent. While levying penalty the Income Tax Officer invoked Explanation to section 271(1)(c) of the Act and held that the assessee had failed to prove that the failure to return the correct income was not on account of fraud or any wilful negligence on the part of the assessee. In the penalty order the Income Tax Officer observed to the following effect :

> "I may mention here that for the assessment year 1972-73, on the same fact, the penalty under sec.271(1)(C) was levied of Rs.86,500/- by the I.A.C. as the assessee itself had admitted the concealment and had failed to prove that the failure to return the correct income was not an account of any gross wilful neglect or fraud on the part of the assessee. The said order of penalty was challenged by the assessee in appeal before the I.T.A.T. and the I.T.A.T. for the reasons recorded in the decision of the Tribunal in the case of Drapco Electronic Corpn., in I.T.Appeal No.115/Ahd/72-73 that explanation to Sec.271(1)(C) was not applicable to the facts of the case and quashed the order of penalty levied by the I.A.C. Being aggrieved by the decision of the I.T.A.T., the department has made a reference to the High Court of - Gujarat The decision of the High Court is awaited."

7. The aforesaid order of penalty was upheld by the Appellate Assistant Commissioner and confirmed by the Tribunal. The Tribunal while confirming the order of the ITO and AAC stated that there was no dispute that there was difference of more than 20% between returned income and the assessed income and hence, the first limb of the Explanation to section 271(1)(c) of the Act was attracted. The Tribunal further observed that in light of the Explanation levy of penalty by the authorities was fully justified. While dealing with contention raised on behalf of the assessee that the order of the Income Tax Officer was based on the same point for earlier year and that the Tribunal had in its order relating to assessment year 1972-73 cancelled the penalty as imposed by the IAC and hence on the same parity of reasoning penalty for the year under consideration was not justified, held that the facts were some what different. Elaborating on this aspect of the matter the Tribunal has further stated that in the preceding year i.e. assessment year 1972-73 the Income Tax Officer had made addition in respect of suppressed purchases which was substituted by the Tribunal by making addition for unexplained investment and estimated profits, while for the year under consideration the Income Tax Officer himself had estimated the profits on the basis of clandestine transactions while making assessment itself. Therefore, the Tribunal distinguished its own order for the immediately preceding year and confirmed the levy of penalty.

8. Mr.M.K.Patel, learned Advocate, appearing on behalf of the assessee assailed the finding recorded by the Tribunal to the effect that the facts of the present year stood on a different footing by referring to the assessment order with special reference to para 2 wherein the Income Tax Officer himself has observed that the facts for the year are similar to that of the earlier year. It was further pointed out that the Income Tax Officer had adopted an erroneous basis for the purpose of computing or estimating the profit which is the foundation on which the penalty is levied. It was therefore submitted that even if the Explanation to section 271(1)(c) is invoked against the assessee it should be held that the burden which lay on the assessee stood discharged in light of what was recorded in the assessment order and the order of the Tribunal should be set aside and the penalty should be held to be wrongly levied and confirmed. It was further submitted that the Tribunal's order for the immediate preceding year wherein penalty on similar facts and circumstances had been deleted had been confirmed by this Court in judgment and

order dated 21/10/1992 rendered in ITR No.91 of 1979 and for the reasons stated in the aforesaid judgment of this Court the present Reference should be allowed.

9. Mr.B.B.Nayak, learned Counsel appearing on behalf of the revenue in support of the Tribunal's order submitted that once Explanation to section 271(1)(c) of the Act was attracted it would make no difference even if the difference between the assessed income and the returned income has arisen on the basis of estimated addition if ultimately such addition stood confirmed or had become final. It was submitted that in case of the assessee the order of the Tribunal in quantum proceedings had attained finality and hence it was not open to the assessee to contend otherwise. It was further submitted that as held by the Tribunal once it was established that there was difference of more than 20% between the returned income and the assessed income a statutory presumption arose to the effect that the assessee had concealed its particulars of income or furnished inaccurate particulars and such a presumption could be rebutted only if the assessee could show that the difference in question had not arisen due to either fraud or gross or wilful neglect on the part of the assessee in returning the correct income. It was further pointed out from the Tribunal's order that the Tribunal had categorically held that as a matter of fact the clandestine activity of purchase and sale of groundnut oil had been established, that therefore, the assessee's explanation had not been accepted by the Tribunal and in light of these findings recorded by the Tribunal it was not open for this Court to take any other view of the matter. In support of his case the decisions of this Court in the case of C.I.T. vs. Somnath Oil Mills, 214 I.T.R.32 and in the case of C.I.T. Vs. Jamnadas and Co.,210 I.T.R.218 were pressed into service.

10. The settled legal position is that the Explanation to section 271(1)(c) of the Act provides for raising a presumption against the assessee in case where the total income returned by any person is less than 80% of the total income as assessed under section 143 or 144 or section 147 of the Act; such a presumption is rebuttable and the onus which is held to be on the revenue in the main provision shifts to the assessee when the Explanation is invoked against the assessee and as held by the Apex Court as well as this Court (C.I.T. Vs. S.P.Bhatt, 97 I.T.R. 440), an assessee can discharge this onus on the basis of preponderance of probabilities. In other words : "it is a burden akin to that in a civil case where the determination is made upon preponderance

of probabilities. It is also not necessary that any positive material should be produced by the assessee in order to discharge this burden which rests upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings, irrespective of whether it is produced by him or by the revenue. If it can be said on a preponderance of probabilities that the failure to return the total assessed income has not arisen on account of any fraud or any gross or wilful neglect on the part of the assessee, the legal fiction enacted in the Explanation cannot arise and the revenue must fail in its attempt to impose penalty upon the assessee."

11. Applying the aforesaid test to the facts of the case we may revert back to the portion of the assessment order to which our attention was drawn on behalf of the assessee. The Income Tax Officer after examination of article nos. 9/4 and 9/5 has stated that while some of the transactions noted in two diaries do find place in regular books of accounts there are many more which do not find place in regular books of accounts. Thereafter, on scrutiny and comparison of the seized material with the regular book of accounts it is found that 6462 bags of groundnut were not accounted for in regular books of accounts and the same have been computed in terms of weight at 1,29,240 kgs. Applying the rate of Rs.1.35 ps. per kilo which was the rate adopted in the regular books of accounts a total purchase price of unaccounted purchases had been computed Rs.1,74,475/-. Thereafter, it is held that as this may not be the only unaccounted purchases an estimated addition of similar unaccounted purchases at 10% is felt reasonable and accordingly, the purchase price of concealed purchases had been arrived at Rs.1,91,921/-. Further, it is held that in view of the purchases of tin etc. involved in these transactions the unaccounted total purchases could be roughly estimated at Rs.2,10,000/-. The Income Tax Officer further goes on to hold that such concealed purchases of Rs.2,10,000/- would roughly involve sales as well to the extent of Rs.2,60,000/-. Adopting ratio of 1:13 in relation to the accounted purchases, capital to the tune of Rs.20,000/has been worked out as being required for making unaccounted purchases. A rate of 5% net profit on sales of Rs.2,60,000/- has been applied and a further addition of Rs.13,000/- has been made as being estimated profit on the sales outside the books. From the aforesaid findings recorded by the assessing officer we find that the Income Tax Officer has made estimates in three stages which tantamounts to rewriting seized material. After working out the unaccounted purchases of Rs.1,74,475/- an

estimate of 10% thereof has been made in the first stage for similar unaccounted purchases; thereafter this figure has further been enhanced by estimating unaccounted purchases on account of tins etc. and thereafter the rough estimated figure has been rounded off upto Rs.2,10,000/-. In the third stage it is stated that such concealed purchases of Rs.2,10,000/would roughly involve sales of Rs.2,60,000/-.

12. The matter will have to be approached keeping in light the principles laid down by this Court in C.I.T. Vs.Vinaychand Harilal (Supra) wherein it is stated thus :

> "xxx xxx However, the fact that the Explanation can be invoked does not mean that the presumption cannot be rebutted by the assessee. In order to rebut the presumption raised by the Explanation to s.271(1)(c), it is open to the assessee to point to the record of the case and point to materials on the record which would enable him to show that he had not concealed the particulars of his income or furnished inaccurate particulars of his income xxx xxx xxxx "

13. It is settled legal position that the seized material has to be read and accepted as a whole and it is not permissible to pick and choose or make further estimates therefrom unless and until there is cogent material in support of undertaking such an exercise. In the present case as was pointed out to us the Income Tax Officer has after processing the seized material made further estimates therefrom and hence the addition made and sustained on the basis of such estimate cannot be said to result in a situation where it would be possible to ascribe the failure to return correct income to assessee on account of any fraud, or any gross or wilful neglect. If that be the case, the Explanation to section 271(1)(c) cannot be invoked against the assessee and penalty levied cannot be sustained. Even if the Explanation to section 271(1)(c) of the Act is held to be applicable on arithmetical difference arising, it can be said that in such circumstances the assessee has rebutted the presumption i.e. discharged the burden.

14. Examining the matter from another angle we find that the Income Tax Officer in the assessment order has categorically stated that the facts and full particulars of the various activities of the assessee have been narrated at length in the immediately preceding year and the facts for the year are similar to that of the earlier year. In the penalty order also the Income Tax Officer has referred to proceedings for the earlier assessment

year. Unreported decision of this Court in assessee's own case has specifically after referring to the decision of this Court in the case of C.I.T. vs. Vinaychand Harilal, 120 I.T.R.752 held in relation to addition of estimated profit that - " It may be stated that we have not gone into the question as to whether the tribunal had changed the base as we are of the view that even otherwise also, the order of the tribunal deserves to be sustained in view of the decision of this Court in Vinaychand Hiralal's case (Supra)".

(emphasis supplied)

15. In so far as the two decisions of this Court, on which the reliance was placed on behalf of the revenue, are concerned, we find that the decision in the case of Somnath Oil Mills (Supra) the Court was not called upon to deal with the fact situation where the Explanation was invoked against the assessee and moreover in the said case the entire unrecorded purchases had been added by the Income Tax Officer as against which the AAC had sustained the addition in relation to extent of Rs.35,220/- and the other issue was regarding deduction of sales tax liability in relation to unaccounted purchases viz. whether such a liability was deductible or not. As can be seen from reported decision the finding of the Tribunal was to the effect that the sales disclosed by the assessee would be the net sales after deducting the sales tax liability. In view of such situation the said decision does not advance the case of the revenue any further.

16. In so far as the other decision in the case of Jamnadas and Co.(Supra) is concerned, the Court has again referred to and relied upon the findings recorded by the Tribunal and on the basis of the same held that the assessee had failed to discharge the burden placed upon it. The said decision has also therefore rested on its own facts.

17. In view of what is stated hereinbefore, we hold that the Tribunal was not justified in holding that the penalty of Rs.10,400/- imposed under section 271(1)(c) of the Act was justified on the basis of the Explanation to section 271(1)(c) of the Act. The assessee having rebutted the presumption, by pointing out the facts forming part of the assessment record, which arises under Explanation to section 271(1)(c) of the Act, it is not possible to hold that penalty levied under section 271(1)(c) of the Act is sustainable on the facts and circumstances of the case.

18. The first question referred to us is answered in the negative i.e. in favour of the assessee and against the revenue. The second question need not be answered as learned Counsel for the applicant assessee has not pressed the said question.

19. The Reference stands disposed of accordingly with no order as to costs.

Sd/- Sd/-
(A.R.Dave, J) (D.A.Mehta,J)

m.m.bhatt